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IN THE

Supreme Court of the United States

DENNIS McBRIDE and ROBERT O'MARA,

Petitioners,

v.

JOSE ORTIZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the exhaustion provision of the Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(a), prescribes a "total exhaustion" rule that requires a federal district court to dismiss without prejudice a prisoner's action challenging prison conditions if the complaint contains both exhausted and unexhausted claims.

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OPINIONS BELOW

The opinion of the Second Circuit, reported at 380 F.3d 649 (2d Cir. 2004), is set forth in Appendix A. A prior opinion of the Second Circuit, reported at 323 F.3d 191 (2d Cir. 2003), is set forth in Appendix B. The memorandum, judgment and order of the district court, dated March 11, 2002 and electronically reported at 2002 U.S. Dist. LEXIS 10722, is set forth in Appendix C. A transcript of the district court's unreported decision on March 7, 2002 is set forth in Appendix D. A memorandum and order of the district court on remand, dated November 2, 2004 and electronically reported at 2004 U.S. Dist. LEXIS 21983, is set forth in Appendix E. An order of the district court dated November 9, 2004 is set forth in Appendix F.

STATEMENT OF JURISDICTION

The order of the Second Circuit was entered on August 18, 2004. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1) (1993).

STATUTORY PROVISION INVOLVED

The Prison Litigation Reform Act of 1995, P.L. 104-134, 110 Stat. 1321 (1996), provides in pertinent part:

> (a) Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a) (2003).

STATEMENT OF THE CASE

A. Statutory Background

Prior to 1996, the requirement that a state prisoner exhaust administrative remedies before commencing an action under 42 U.S.C. § 1983 was "in large part discretionary." *Porter v. Nussle*, 534 U.S. 516, 523 (2002). The then-governing statute authorized a district court, if it "believe[d] that such a requirement would be appropriate and in the interests of justice," to stay the prisoner's action for a period not to exceed 180 days while the prisoner exhausted administrative remedies. *See* Civil Rights of Institutionalized Persons Act, 94 Stat. 352, as amended, 42 U.S.C. § 1997e (1994).

In the Prison Litigation Reform Act of 1995 (PLRA), Congress "invigorated the exhaustion prescription." *Porter*, 534 U.S. at 524. 42 U.S.C. § 1997e(a) now provides that "[n]o action shall be brought with respect to prison conditions" under § 1983 or other federal law "until such administrative remedies as are available are exhausted." Thus, "exhaustion in cases covered by § 1997e(a) is now mandatory." *Porter*, 534 U.S. at 524. The statute, without exception, requires that a prisoner exhaust all available administrative remedies before an action challenging prison conditions can be brought.

This petition presents the question of whether the PLRA's invigorated exhaustion requirement requires "total exhaustion" such that a prisoner must exhaust available administrative remedies on every claim asserted in an action challenging prison conditions, and a district court must dismiss the action without prejudice if the complaint contains both exhausted and unexhausted claims.

B. Facts And Procedural History

On July 6, 1999, respondent Jose Ortiz, a prisoner in a New York State prison, filed a complaint in the United States District Court for the Eastern District of New York. He invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1343(3) and (4) and 2201. In an amended complaint filed on or about November 6, 2001, Ortiz asserted two causes of action under 42 U.S.C. § 1983. He alleged that: (1) a prison disciplinary hearing, which resulted in ninety days' confinement in the special housing unit (SHU), deprived him of a liberty interest protected by the Fourteenth Amendment without due process of law; and (2) the SHU conditions to which he was subjected constituted cruel and unusual punishment under the Eighth Amendment.

Petitioners McBride and O'Mara moved to dismiss the amended complaint. They maintained that Ortiz had failed to state a due process or Eighth Amendment claim and that, in any event, his entire action had to be dismissed under 42 U.S.C. § 1997e(a) because he had failed to exhaust administrative remedies on all of his claims. By judgment dated March 11, 2002, the district court granted the motion (App. C, 42a). The district court held that Ortiz's SHU confinement was too brief to support a due process claim and that he had failed to exhaust available administrative remedies with respect to the Eighth Amendment claim (App. D, 44a-45a).

Upon Ortiz's appeal, the Second Circuit ordered that counsel be appointed for Ortiz and scheduled additional briefing and oral argument (App. B, 40a-41a). Among other issues, the court ordered the parties to address whether 42 U.S.C. § 1997e(a) requires "total exhaustion" of claims

before a § 1983 action challenging prison conditions can be commenced (App. B, 40a-41a).

In an opinion entered August 18, 2004, the Second Circuit vacated the district court's judgment and remanded the case for further proceedings (App. A, 1a-31a). The court held that Ortiz had stated a due process claim because he had sufficiently alleged that the conditions of his SHU confinement "impose[d] atypical and significant hardship on [him] in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995) (App. A, 10a-14a). The court further found that Ortiz had exhausted administrative remedies with respect to that claim, but not with respect to his Eighth Amendment claim (App. A, 9a-10a).

The Second Circuit rejected the defendants' argument that the unexhausted Eighth Amendment claim required dismissal of the action pursuant to § 1997e(a).[1] Starting with the text of the statute, the court acknowledged that "[s]ection 1997e(a) clearly instructs that an action such as Ortiz's containing exhausted and unexhausted claims should not have been 'brought'" (App. A, 17a). Nevertheless, the court found the statute "too ambiguous" to conclude that Congress intended that such an action be dismissed, because according to the Second Circuit, "[t]he statute does not say so" (App. A, 17a, 19a).

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1. The court explained that this issue was not avoided by Ortiz's concession for the first time on appeal that his Eighth Amendment claim was not viable, because this did "not alter the fact that Ortiz 'brought,' *see* 42 U.S.C. § 1997e(a), a lawsuit presenting both an exhausted and an unexhausted claim" (App. A, 14a).

Turning to the PLRA's legislative history and policy, the Second Circuit recognized that "[i]t is '[b]eyond doubt that Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits'" (App. A, 20a) (*quoting Porter v. Nussle*, 534 U.S. 516, 524 (2002)). But the court was not persuaded that "a requirement that district courts dismiss 'mixed' actions in their entirety would help achieve Congress's goal of improving the quality of, or judicial efficiency in disposing of, prisoners' section 1983 suits" (App. A, 20a).

The Second Circuit noted that the Tenth Circuit's decision in *Ross v. County of Bernalillo*, 365 F.3d 1181 (10th Cir. 2004), was "contrary to [its] view" (App. A, 23a). In *Ross*, the Tenth Circuit held that § 1997e(a) requires dismissal of an action containing any unexhausted claims, relying in part on an analogy to the total exhaustion requirement for habeas corpus petitions imposed by 28 U.S.C. § 2254. *See Rose v. Lundy*, 455 U.S. 509 (1982). The Second Circuit nonetheless declined to follow the Tenth Circuit's "carefully reasoned argument" (App. A, 24a).

Finally, the Second Circuit stated that "in the ordinary case," including this one, the district court will "proceed directly to decide the exhausted claims without waiting for the plaintiff to attempt to exhaust available administrative remedies with respect to the dismissed claims" (App. A, 30a).

REASONS FOR GRANTING THE PETITION

I. There Is A Conflict Among The Lower Federal Courts On The Important Question Of Whether The PLRA Requires Total Exhaustion.

This Court should grant certiorari to resolve a circuit conflict over whether 42 U.S.C. § 1997e(a) prescribes a total exhaustion rule that requires a district court to dismiss without prejudice a prisoner's action that asserts both exhausted and unexhausted claims.

In the decision below, the Second Circuit held that neither the language of § 1997e(a) nor the policies underlying the PLRA supported the conclusion that Congress intended that "mixed" prisoner actions be dismissed. As the Second Circuit acknowledged (App. A, 23a), its decision directly conflicts with that of the Tenth Circuit in *Ross v. County of Bernalillo*, 365 F.3d 1181 (10th Cir. 2004). In *Ross*, the Tenth Circuit held that "the PLRA contains a total exhaustion requirement, and [thus] the presence of unexhausted claims in [the prisoner's] complaint required the district court to dismiss his action in its entirety without prejudice." *Id.* at 1189.[2]

2. In a subsequent unpublished decision, *West v. Kolar*, 2004 U.S. App. LEXIS 17102 (10th Cir. 2004), involving a challenge to prison conditions that included both exhausted and unexhausted claims, the Tenth Circuit stated that the district court should have either dismissed the entire complaint or given the inmate an opportunity to dismiss voluntarily his unexhausted claims. This decision, while less than a rigorous application of *Ross*'s holding that a district court is "required" to dismiss a mixed complaint without prejudice, 365 F.3d at 1189, is not a binding precedent under the rules of the Tenth Circuit. *See* 10th Cir. R. 36.3 (unpublished orders and judgments are not binding precedents except under the doctrines of law of the case, res judicata and collateral estoppel).

Ross followed the Eighth Circuit's decision in *Graves v. Norris*, 218 F.3d 884 (8th Cir. 2000), which held that "[w]hen multiple prison condition claims have been joined . . . , the plain language of § 1997e(a) requires that all available prison grievance remedies must be exhausted as to all of the claims," *id.* at 885, and affirmed the district court's dismissal of the action without prejudice. The Eighth Circuit's subsequent decision in *Kozohorsky v. Harmon*, 332 F.3d 1141 (8th Cir. 2003), holding that the prisoner should have been permitted to amend his mixed complaint to strike his unexhausted claims, is at odds with its affirmance of the dismissal in *Graves* and reflects confusion on the total exhaustion rule and the proper disposition of an action where there has not been total exhaustion.[3]

The reasoning of the Second and Tenth Circuits' decisions, as well as the results in these cases, is in conflict. The Second Circuit found § 1997e(a) "too ambiguous" to conclude that Congress intended a total exhaustion requirement (App. A, 19a). The Tenth Circuit, however, concluded that "the language in § 1997e(a) itself suggests a

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3. In *Knuckles El v. Toombs*, 215 F.3d 640 (6th Cir.), *cert. denied*, 531 U.S. 1040 (2000), the Sixth Circuit identified the issue but reserved decision on it. Since then, the court has issued conflicting unpublished decisions, highlighting the confusion in the lower courts on this issue. *Compare Smith v. Hoffman*, 2003 U.S. App. LEXIS 18823 (6th Cir. 2003) (unreported) (there is "no provision for a 'mixed complaint'" and because prisoner "did not exhaust his available administrative remedies as to each claim, dismissal of the complaint was appropriate"); *Shorter v. Campbell*, 2003 U.S. App. LEXIS 3343 (6th Cir. 2003) (unreported) (same); *with Bomer v. Hakola*, 2003 U.S. App. LEXIS 26569 (6th Cir. 2003) (unreported) ("A district court is free to address the merits of exhausted claims and dismiss only those that are unexhausted."); *Byers v. Strachan*, 2003 U.S. App. LEXIS 12861 (6th Cir. 2003) (unreported) (same).

requirement of total exhaustion because it prohibits an 'action' (as opposed to merely preventing a 'claim') from proceeding until administrative remedies are exhausted." *Ross*, 365 F.3d at 1190. The Second Circuit believed that a total exhaustion requirement would not further the policies underlying the PLRA (App. A, 20a-23a), but the Tenth Circuit reached the opposite conclusion — that "the policies underlying the PLRA point toward a requirement of total exhaustion." *Ross*, 365 F.3d at 1190. Disagreeing with the Second Circuit on the practical implications of the rule, the Tenth Circuit explained that a total exhaustion rule encourages prisoners to make full use of grievance procedures so that prison officials have the first opportunity to remedy all complaints, facilitates the creation of an administrative record to assist judicial review, relieves district courts from determining whether exhausted claims are severable from exhausted claims, and reduces piecemeal litigation. *Id.*

The federal district courts in other circuits are also divided on the question of whether the PLRA requires total exhaustion. *Compare Brown v. Alameida*, 2004 U.S. Dist. LEXIS 9941 (N.D. Cal. 2004) (unreported) (applying total exhaustion rule); *Chamberlain v. Overton*, 326 F. Supp. 2d 811 (E.D. Mich. 2004) (same); *Mubarak v. California Dep't of Corr.*, 315 F. Supp. 2d 1057 (S.D. Cal. 2004) (same); *Carrion v. Wilkinson*, 309 F. Supp. 2d 1007 (N.D. Ohio 2004) (same); *Pogue v. Calvo*, 2004 U.S. Dist. LEXIS 3233 (N.D. Cal. 2004) (unreported) (same); *Ellison v. California Dep't of Corr.*, 2003 U.S. Dist. LEXIS 8545 (N.D. Cal. 2003) (unreported) (same); *Martinez v. Lamarque*, 2003 U.S. Dist. LEXIS 8541 (N.D. Cal. 2003) (unreported) (same); *Smeltzer v. Hook*, 235 F. Supp. 2d 736 (W.D. Mich. 2002) (same); *Johnson v. Price*, 2002 U.S. Dist LEXIS 14371 (S.D. Mich. 2002) (unreported) (same); *Rivera v. Whitman*, 161 F. Supp.

2d 337 (D.N.J. 2001) (same); *Julian-Bey v. Crowley*, 2000 U.S. Dist. LEXIS 14071 (W.D. Mich. 2000) (same), *aff'd*, 2001 U.S. App. LEXIS 26192 (6th Cir. 2001) (unreported); *Thorp v. Kepoo*, 100 F. Supp. 2d 1258 (D. Haw. 2000) (same); *and Keenan v. Twommey*, 1999 U.S. Dist. LEXIS 11829 (W.D. Mich. 1999) (same), *aff'd*, 2000 U.S. App. LEXIS 21200 (6th Cir. 2000) (unreported); *with Henderson v. Sebastian*, 2004 U.S. Dist LEXIS 17581 (W.D. Wis. 2004) (unreported) (rejecting total exhaustion rule); *Blackmon v. Crawford*, 305 F. Supp. 2d 1174 (D. Nev. 2004) (same); *Alexander v. Davis*, 282 F. Supp. 2d 609 (W.D. Mich. 2003) (same); *Armstrong v. Gilman*, 2001 U.S. Dist. LEXIS 21016 (W.D. Mich. 2001) (unreported) (same); *King v. Zamiara*, 2001 U.S. Dist. LEXIS 17019 (W.D. Mich. 2001) (unreported) (same); *Johnson v. True*, 125 F. Supp. 2d 186 (W.D. Va. 2000) (same), *appeal dismissed*, 2002 U.S. App. LEXIS 7153 (4th Cir. 2002) (unreported); *Graham v. Moskalik*, 2000 U.S. Dist. LEXIS 11671 (W.D. Mich. 2000) (unreported) (same); *Cooper v. Garcia*, 55 F. Supp. 2d 1090 (S.D. Cal. 1999) (same); *Jenkins v. Toombs*, 32 F. Supp. 2d 955 (W.D. Mich. 1999) (same).

The importance of the issue presented here is underscored by the number of potentially affected cases. Tens of thousands of prisoner civil rights cases are commenced each year. *See* Administrative Office of the U.S. Courts, *Judicial Facts and Figures*, Table 2.2 (2003), http://www.uscourts.gov/judicialfactsfigures/table2.02.pdf (24,073 prisoner civil rights cases filed in federal district courts in 2003). As the Second Circuit noted, prisoners' § 1983 actions "routinely seek to address more than one grievance — sometimes a laundry list of grievances — relating to different events or circumstances" (App. A, 27a). As suggested by the many conflicting decisions on this issue, the complaints often include both exhausted and unexhausted claims. Without a

definitive ruling from this Court, the PLRA's exhaustion requirement will continue to be applied inconsistently in the courts across the country. A primary purpose of the PLRA is to lessen the burden of prisoner litigation on the judiciary, and a decision by this Court will end time- and resource-consuming litigation on this threshold issue. Accordingly, a grant of certiorari is warranted.

II. The Decision Below Is Legally Erroneous.

The Second Circuit erred in interpreting § 1997e(a), disregarding both the literal terms of the provision and the extent to which a total exhaustion rule furthers the policies underlying the PLRA.

A. The Plain Language Of § 1997e(a) Requires Total Exhaustion of Administrative Remedies Before An "Action" May Be "Brought."

The language of § 1997e(a) is plain and it is mandatory. It provides that "[n]o *action* shall be *brought* with respect to prison conditions . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (2003) (emphasis added). By using the word "action" instead of "claim," Congress clearly expressed its intent that a prisoner be required to exhaust available administrative remedies on all claims before commencing an action. *See Booth v. Churner*, 532 U.S. 731, 738 (2001) (§ 1997e(a) requires that available administrative remedies be exhausted "before *a complaint* under § 1983 may be entertained") (emphasis added).[4] That Congress knew the legal difference between

4. This statutory language can be contrasted with that of 28 U.S.C. § 2254(b)(1), governing exhaustion in the habeas corpus (Cont'd)

an "action" and a "claim" is reflected in 42 U.S.C. §§ 1997e(c)(1) and (2), which use both terms, and where different meanings must be presumed.

Moreover, § 1997e(c)(2), authorizing a district court to dismiss claims that are frivolous, malicious, fail to state a claim or seek damages from a defendant immune from such relief, does not authorize a district court to dismiss only the unexhausted claims in a mixed complaint. If Congress had intended to permit this procedure, "it could simply have said so" in § 1997e(c). *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000). It did not, and thus the plain language of § 1997e(a), barring the filing of a mixed complaint in the first instance, controls.

The Second Circuit acknowledged that this action was brought in violation of § 1997e(a)'s plain terms (App. A, 17a). The court's conclusion that the PLRA's exhaustion requirement was "too ambiguous" (App. A, 19a) to require dismissal was error. The text of the statute requires dismissal, because Congress could not have intended that an action it

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(Cont'd)

context, which provides that "[a]n application . . . shall not be granted" unless state remedies are exhausted. In *Rhines v. Weber*, 124 S. Ct. 2905 (2004) (No. 03-9046), this Court granted certiorari to consider whether a district court may employ a "stay and abeyance" procedure for mixed habeas corpus petitions. Because of the PLRA's different statutory language, and because the current § 1997e(a) was substituted for a provision containing a discretionary stay, this Court's decision in *Rhines* will not be controlling on the issue under the PLRA. While both exhaustion provisions implicate similar overarching concerns, *see Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973), the text of § 1997e(a) and the fact that the current provision was substituted for a stay procedure preclude the use of a "stay and abeyance" procedure for mixed prisoner complaints.

prohibited from being "brought" at all in the first instance could continue in any fashion. *See Hallstrom v. Tillamook County*, 493 U.S. 20, 31 (1989) ("As a general rule, if an action is barred by the terms of a statute, it must be dismissed.").[5]

The Second Circuit's view that an action may continue, even though a statutory condition precedent to its commencement had not been satisfied, cannot be reconciled with this Court's precedents. For example, in *McNeil v. United States*, 508 U.S. 106 (1993), this Court considered a provision of the Federal Tort Claims Act requiring that an "action shall not be instituted" unless the claimant has first exhausted administrative remedies. 28 U.S.C. § 2675(a) (1994). This Court held that "[t]he most natural reading of the statute indicates that Congress intended to require complete exhaustion of Executive remedies before invocation of the judicial process." *McNeil*, 508 U.S. at 112. Thus, "[b]ecause petitioner failed to heed that clear statutory command, the District Court properly dismissed his suit." *Id.* at 113. Likewise, in *Hallstrom*, this Court held that the notice and delay requirements in a statute providing that "[n]o action may be commenced" until 60 days after the plaintiff gives notice to certain parties "are mandatory

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5. Indeed, in its decision in *Neal v. Goord*, 267 F.3d 116 (2d Cir. 2001), the Second Circuit affirmed the dismissal without prejudice of a prisoner's complaint asserting unexhausted claims, even though he had exhausted at least some of the claims while the action was pending. The court explained that "the plain language of § 1997e(a) . . . suggests that exhaustion *prior to commencement* of a § 1983 action is mandated" (emphasis added) and that permitting the action to proceed would "undermine[] Congress' directive to pursue administrative remedies prior to filing a complaint in federal court." *Id.* at 122-23.

conditions precedent to commencing suit . . . ; a district court may not disregard these requirements at its discretion." 493 U.S. at 31 (discussing 42 U.S.C. § 6972(b)(1) (2003)). Accordingly, where the statutory conditions precedent have not been satisfied, "the district court must dismiss the action as barred by the terms of the statute." *Id.* at 33.

The Second Circuit should have reached the same result in this case. As even the Second Circuit recognized, § 1997e(a) unambiguously prohibits bringing an action where a mandatory condition precedent — exhaustion of available administrative remedies on all asserted claims — is not satisfied. As this Court held in *McNeil*, "'strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.'" *McNeil*, 508 U.S. at 113 (*quoting Mohasco Corp v. Silver*, 447 U.S. 807, 826 (1980)). In enacting the PLRA, Congress replaced a provision authorizing district courts to issue a discretionary stay for the purposes of exhaustion with a condition precedent requiring complete exhaustion. That plain mandate from Congress should not be disregarded.

B. A Total Exhaustion Rule Furthers The Policies Underlying The PLRA And § 1997e(a).

The policies underlying the PLRA's enactment weigh heavily in favor of a total exhaustion rule. This Court has stressed "the PLRA's dominant concern to promote administrative redress, filter out groundless claims, and foster better prepared litigation of claims aired in court." *Porter v. Nussle*, 534 U.S. 516, 528 (2002). Indeed, this Court has found it "[b]eyond doubt [that] Congress enacted § 1997e(a) to reduce the quality and improve the quality of prisoner suits." *Id.* at 524.

As the Tenth Circuit held in *Ross*, a total exhaustion rule significantly furthers these purposes. It maximizes the incentive for prisoners to make full use of prison grievance procedures and exhaust administrative remedies on all claims before joining them in an action, giving prison officials the first opportunity to resolve complaints. *See Porter*, 534 U.S. at 525 (in § 1997e(a), "Congress afforded corrections officials time and opportunity to address complaints internally before allowing initiation of a federal case"); *cf. Duncan v. Walker*, 533 U.S. 167, 178-80 (2001) (adopting construction that provides a "powerful incentive" to exhaust available remedies and rejecting interpretation that "would do far less to encourage exhaustion"). The rule thus promotes federal-state comity, which "has as much relevance in areas of particular state administrative concern as it does where state judicial action is being attacked." *Preiser v. Rodriguez*, 411 U.S. 475, 491 (1973). Indeed, "[s]ince [the] internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems." *Porter*, 534 U.S. at 531 (*quoting Preiser*, 411 U.S. at 492).

As a result, a total exhaustion rule will inevitably reduce the quantity and enhance the quality of prisoner suits. In many cases, "corrective action taken in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation," or "internal review might 'filter out some frivolous claims.'" *Porter*, 534 U.S. at 525 (*quoting Booth v. Churner*, 532 U.S. 731, 737 (2001)). Here, had Ortiz diligently grieved the SHU conditions allegedly violating the Eighth Amendment, they might have been resolved without the initiation of a legal action. Moreover, total exhaustion is particularly important where, as here, exhausted and unexhausted claims are

factually and legally intertwined, so that prison officials have an opportunity to address all related complaints at one time. Indeed, had prison officials addressed the alleged SHU conditions after a grievance by Ortiz, the conditions would no longer have imposed an "atypical and significant hardship" sufficient to implicate a liberty interest on Ortiz's Fourteenth Amendment claim, *see Sandin v. Conner*, 515 U.S. 472, 484 (1995), and his § 1983 complaint might have been obviated altogether.

The total exhaustion rule also enhances the quality of prisoner suits by strongly discouraging the inclusion of unexhausted claims in a complaint. Under the Second Circuit's rule, where unexhausted claims are simply dismissed from a mixed complaint and exhausted claims proceed through litigation, nothing deters the prisoner from loading a complaint with both exhausted and unexhausted claims, leaving it to the district court to sort them out. The Second Circuit suggested that if, on the other hand, the entire complaint were to be dismissed without prejudice, the prisoner might just refile the action with the unexhausted claims omitted. However, the prisoner would then be assessed a second filing fee, *see* 28 U.S.C. § 1915(b)(1), which encourages prisoners to ensure that all claims are exhausted prior to filing. *See Leonard v. Lacy*, 88 F.3d 181, 185 (2d Cir. 1996) ("there is abundant legislative history to indicate that Congress was endeavoring to reduce frivolous prisoner litigation by making all prisoners seeking to bring lawsuits or appeals feel the deterrent effect created by liability for filing fees"). Thus, the total exhaustion rule will meaningfully improve the quality of prisoner complaints, as Congress intended. *See Porter*, 534 U.S. at 528 (dominant concern of PLRA to, *inter alia*, "foster better prepared litigation of claims aired in court").

A total exhaustion rule also promotes the creation of a full administrative record for judicial review of claims ultimately litigated. Had Ortiz properly exhausted his Eighth Amendment claim, an administrative record regarding the nature of his SHU conditions would have been created. This record would have assisted the court in adjudicating not only that claim, if ultimately pursued, but also Ortiz's Fourteenth Amendment claim, which turns in part on the atypicality of those conditions. While, as the Second Circuit noted, prison administrative proceedings are not as formal as court proceedings, they nevertheless produce a more complete evidentiary record — an important factor notwithstanding the less formal nature of the administrative process. *See Porter*, 534 U.S. at 525 ("for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy").

The total exhaustion rule also markedly promotes judicial economy. As the Second Circuit noted, "prisoners' actions may present questions as to whether one or more claims have been exhausted that are not only genuine, but challenging for the courts to decide" (App. A, 22a). But this fact weighs in favor of a total exhaustion rule. As discussed above, the rule strongly encourages a prisoner to include only clearly exhausted claims in a complaint. Also, if a complaint must be dismissed once a district court identifies one unexhausted claim, the court is spared the effort of determining whether every other claim in the complaint has been exhausted.

The total exhaustion rule also prevents piecemeal litigation of claims. By mandating that "[n]o action shall be brought" until all administrative remedies are exhausted, Congress intended to avoid the inefficiency that would result

if a prisoner can proceed to litigate exhausted claims, and then bring related unexhausted claims at a subsequent time after they have been exhausted. Such inefficiency will follow from the Second Circuit's directive that, in the ordinary case, the district must proceed to decide the exhausted claims without waiting for the prisoner to attempt to exhaust administrative remedies on his dismissed claims, regardless of whether the claims are related (App. A, 30a).[6]

Finally, the total exhaustion provides "a simple and clear instruction to potential litigants," *Rose v. Lundy*, 455 U.S. 509, 520 (1982): before you bring an action in federal court, make sure that you have administratively exhausted all of your claims in the prison system. Prisoners should "be able to master this straightforward exhaustion requirement." *Id.* If a prisoner's action is dismissed without prejudice on this ground, he or she can refile the complaint in compliance with § 1997e(a), and thus the rule "does not unreasonably impair the prisoner's right to relief." *Id.* at 522.

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6. In its memorandum and order on remand, the district court noted this inefficiency, stating that "[i]n the absence of this directive, a trial court might usually encourage all claims to be expeditiously exhausted so that discovery and trial could go forward on all related claims together, and so that a trial with the same witnesses and documents would not have to be repeated" (App. E, 48a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED AUGUST 18, 2004

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2003

(Argued: May 27, 2004 Decided: August 18, 2004
Errata Filed: September 28, 2004)

Docket No. 02-0088.

JOSE ORTIZ,

Plaintiff-Appellant,

- v -

D. MCBRIDE, SGT. & R.O. MARA, COUNSELOR OF ARTHUR KILL CORRECTIONAL FACILITY,

Defendants-Appellees.

Before: CALABRESI and SACK, *Circuit Judges*, and PAULEY, *District Judge*.*

The plaintiff, who is incarcerated in a New York State prison, brought suite against prison officials pursuant to 42 U.S.C. § 1983. He alleges that (1) his sentence of

* The Honorable William H. Pauley III, of the United States District Court for the Southern District of New York, sitting by designation.

confinement for ninety days in a special housing unit under unusually harsh conditions violated is Fourteenth Amendment due process rights, and (2) his treatment in the unit violated his Eighth Amendment right to be free from cruel and unusual punishment. The plaintiff had exhausted availale administrative remedies with respect to the first claim, but not the second. The United States District Court for the Eastern District of New York (Jack B. Weinstein, *Judge*) granted the defendants' motion to dismiss the plaintiff's complaint under Federal Rule of Civil Procedure 12(b)(6) on the grounds that the special housing unit confinement was too brief to support a due process claim and that the plaintiff had failed to exhaust available administrative remedies with respect to the Eighth Amendment claim, requiring its dismissal under 42 U.S.C. § 1997e(a).

Vacated and remanded.

SACK, *Circuit Judge*

In this appeal, we consider whether the exhaustion provision of the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a), requires a federal district court to dismiss in its entirety a prisoner's complaint brought pursuant to 42 U.S.C. § 1983 with respect to the conditions of his or her incarceration if the complaint contains any claim that has not been administratively exhausted within the prison system. Based on an examination of the text of section 1997e and the policies underlying the PLRA, we conclude that such complete dismissal is not required.

Appendix A

This appeal also presents the question whether the due process claim of the plaintiff-appellant, in which he alleges unusually harsh confinement in a special housing unit ("SHU"), can survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) despite the fact that his period of confinement was less than 101 days. In accordance with our recent decision in *Palmer v. Richards,* 364 F.3d 60, 64-66 (2d Cir.2004), and based on the allegations of fact of this case, we conclude that it can.

BACKGROUND

Many of the relevant facts underlying this appeal are set forth in our prior opinion in this case. *Ortiz v. McBride,* 323 F.3d 191, 192-94 (2d Cir.2003) (per curiam). We repeat them here insofar as we think it necessary to explain our resolution of this appeal. Because the appeal is from the district court's dismissal of Ortiz's complaint, we state the facts as they are alleged in the First Amended Complaint. *See Miller v. Wolpoff & Abramson, L.L.P.,* 321 F.3d 292, 300 (2d Cir.2003).

The Arthur Kill Correctional Facility is a prison administered by the New York State Department of Correctional Services ("DOCS"). On September 29, 1998, while Ortiz was incarcerated in Arthur Kill, defendant-appellee Sergeant D. McBride, a corrections officer, confronted Ortiz with the allegations of a confidential informant that Ortiz had violated DOCS rules by smuggling drugs into, and selling them within, Arthur Kill. Ortiz denied the allegations.

Four times, McBride ordered Ortiz to take a urine test in an apparent attempt to establish that he was using (rather than that he had imported or sold) drugs. Each time, the test results were negative. Nonetheless, and despite the fact that the drug smuggling and sale allegations were based entirely on information provided to McBride by the confidential informant, McBride instituted disciplinary proceedings against Ortiz.

On October 2, 1998, the charges against Ortiz were heard in a disciplinary proceeding over which defendant-appellee R.O. Mara, an Arthur Kill counselor, presided (the "Tier III hearing"). The only evidence offered against Ortiz was McBride's statement that the confidential informant had accused Ortiz of selling drugs in the prison. Based on this evidence alone, Mara concluded that Ortiz had committed a disciplinary violation and sentenced him to ninety days of solitary confinement in the prison's SHU, as well as loss of packages, commissary, phone, and recreation privileges for that time. Ortiz appealed the decision through the channels established within DOCS for such review.

During the first three weeks of Ortiz's SHU sentence, he asserts, prison officials confined him to his cell twenty-four hours a day. He was not permitted to shower "for weeks at a time," was denied deodorant and toothpaste, was served meals later than other inmates, and "was not given eating utensils, causing plaintiff to eat with the same fingers he was unable to properly wash." First Amended Compl. ¶ 11. Ortiz's clothes were also "purposely drenched with baby oil." *Id.* Further, according to Ortiz, "[w]hen [he] complained of the

inhumane conditions, corrections officers threatened that he would be physically beaten and charged with additional infractions." *Id.* ¶ 12.

After fifty-seven days in the Arthur Kill SHU, and while his DOCS appeal was pending, Ortiz was transferred to DOCS's Fishkill Correctional Facility. There he was placed in SHU for the remaining thirty-three days of his sentence. Ortiz complains that while in the Fishkill SHU, he was "double-bunked," that is, forced to share the cell, which had only one toilet, with another inmate. According to Ortiz, the inmate with whom he shared his cell posed a physical threat to Ortiz. Ortiz does not assert, however, that he submitted formal DOCS grievances with respect to SHU conditions in either prison.

DOCS's Director of Special Housing/Inmate Disciplinary Program, Donald Selsky, ultimately reversed Ortiz's disciplinary ruling in a document titled "Review of Superintendent's Hearing." It stated, without explanation: "[Y]our Superintendent's Hearing of October 7, 1998, has been reviewed and reversed on December 28, 1998." The ruling came on the ninetieth and final day of Ortiz's SHU confinement.

On July 6, 1999, Ortiz, acting *pro se*, filed a complaint in the United States District Court for the Eastern District of New York asserting causes of action under 42 U.S.C. § 1983. He alleged that (1) the Tier III hearing, which led to the imposition of a sentence of ninety days in SHU confinement, deprived him of a liberty interest protected by the Fourteenth Amendment of the Constitution without due process of law

and (2) the SHU conditions to which he was subjected constituted cruel and unusual punishment in violation of the Eighth Amendment of the Constitution as applied to New York State through the Fourteenth Amendment. He requested a variety of remedies, including compensatory and punitive damages. He also alleged that he had "filed . . . grievances concerning this matter" and that "all grievances [had been] denied[.]" Compl. ¶ 4.

The district court appointed counsel for Ortiz. On November 6, 2001, counsel filed a First Amended Complaint on Ortiz's behalf.

The defendants then moved pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the complaints for failure to state a claim. On March 7, 2002, the district court (Jack B. Weinstein, *Judge*), ruling from the bench, granted the motion. His ruling is set forth in full in our previous per curiam opinion as follows:

> This constitutes my opinion in the case: The Court is compelled to dismiss the case. The main problem that the court saw in the papers was the problem of lack of a test of the veracity of the informer who apparently provided the basis for the complaint by the sergeant. However, there is no point in pursuing that matter since the administrative proceedings within the prison resulted in dismissal of the complaint. So that the plaintiff has obtained all that could be obtained on that issue.

Appendix A

With respect to the conditions within the cramped cell, the Court is compelled under the decisions of the Court of Appeals for the Second Circuit to dismiss those complaints. The Court of Appeals for the Second Circuit requires a very high standard of abuse. It has to be atypical and significant hardship under *Colon* [*v. Howard*], 215 F.3d [227] (2d Cir.2000), and other opinions of the Second Circuit.

Moreover, it is very clear that the Second Circuit in general requires special incarceration of more than 101 days. That is *Colon,* 215 F.3d at 232. . . .

The showering and other personal issues, in connection with other circumstances, may constitute an abusive situation. However, in view of the release from these circumstances within the prison within the 90 days, and dismissal on the main issue, under the cases the Court believes it has no alternative but to dismiss.

The Court of appeals in *Neal* [*v.*] *Goord,* 267 F.3d 116 [2d Cir.2001], required dismissal for failure to exhaust administrative remedies. In this case the exhaustion with respect to the main issue resulted in a favorable decision for the plaintiff. The oral testimony as well as other information before this Court does not make clear any exhaustion with respect to these other issues.

Ortiz, 323 F.3d at 194 (alterations in original). The action was dismissed. The memorandum, judgment, and order of the district court did not state whether the dismissal was with or without prejudice.

Ortiz appealed. In a per curiam opinion, we ordered that appellate counsel be appointed for Ortiz and invited counsel to ask that this case be heard with other pending appeals involving related PLRA issues, *id.* at 196, which he later did. We identified four issues to be addressed "[i]n addition to any other arguments counsel may choose to raise." *Id.* They were,

> (1) whether Ortiz's proffered evidence that he administratively exhausted his Eighth Amendment claim satisfies the requirements of § 1997e(a); (2) whether § 1997e(a) requires "total exhaustion" and, if so, whether Ortiz may now withdraw any unexhausted claims; (3) whether Ortiz's factual allegations that the conditions of his confinement in SHU were unusually harsh sufficed to raise the question of whether that confinement implicated a constitutionally protected liberty interest so as to preclude 12(b) dismissal; (4) whether Ortiz's complaint adequately pled, or could be amended adequately to plead, that the defendants are subject to supervisory liability, under the test described in *Wright v. Smith,* 21 F.3d 496, 501 (2d Cir.1994), for the alleged Eighth Amendment violations.

Id.

Ortiz concedes that his Eighth Amendment cruel and unusual punishment claim is not viable because (1) his complaint did not name the prison officials responsible for his allegedly abusive treatment during SHU confinement, and (2) the named defendants did not possess supervisory authority over the unnamed prison officials responsible for Ortiz's SHU treatment. Accordingly, Ortiz concedes that there is no issue of supervisory liability in this case. We thus limit our review to the first three of our questions.

DISCUSSION

I. Standard of Review

"We review a dismissal granted under Rule 12(b)(6) de novo, with all inferences drawn in favor of the nonmoving party." *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 169 (2d Cir.1999). We similarly review a district court's ruling on whether a plaintiff whose claim is governed by the PLRA has exhausted administrative remedies de novo. *See Mojias v. Johnson*, 351 F.3d 606, 608- 09 (2d Cir.2003).

II. The Status of Ortiz's Claims

All parties agree, as do we, that Ortiz has exhausted his available administrative remedies with respect to his due process claim. He appealed the Tier III hearing and obtained a reversal. He did not appeal to the highest level of DOCS, but inasmuch as he obtained a favorable determination regarding his due process claim, no such further appeal was required. *See Abney v. McGinnis*, No. 02-0241, __ F.3d __, __, slip op. at [ ] (2d Cir.2004) ("To require prisoners to

appeal all favorable resolutions ... would be impracticable."); *Marvin v. Goord,* 255 F.3d 40, 43 n. 3 (2d Cir.2001) (per curiam); *see also Ross v. County of Bernalillo,* 365 F.3d 1181, 1187 (10th Cir.2004) ("Once a prisoner has won all the relief that is available under the institution's administrative procedures, his administrative remedies are exhausted. Prisoners are not required to file additional complaints or appeal favorable decisions in such cases.").

There is no basis, however, for us to conclude that Ortiz exhausted his available administrative remedies with respect to his Eighth Amendment claim. He alleges only that he complained orally, to no avail, about the SHU conditions which are the subject of the claim. According to his complaint, "When plaintiff complained of the inhumane conditions, corrections officers threatened that he would be physically beaten and charged with additional infractions." First Amended Compl. ¶ 12. Although in some circumstances threats by prison guards may render administrative remedies "unavailable" for purposes of section 1997e(a), *see Hemphill v. State of New York,* No. 02-0164, __ F.3d __, __, slip op. at **[16-19]** (2d Cir.2004), Ortiz alleges only that he was threatened when he complained. He does not contend that the threats from guards prevented him from filing a grievance or otherwise rendered DOCS grievance procedures unavailable.

III. Ortiz's Due Process Claim

If Ortiz's Fourteenth Amendment due process claim relating to his disciplinary hearing failed to state a claim upon which relief can be granted, the claim could be dismissed

pursuant to 42 U.S.C. § 1997e(c)(2). In that case, only Ortiz's Eighth Amendment claim would remain, and, because it is unexhausted, it too would have to be dismissed under 42 U.S.C. § 1997e(a). *See infra* Part IV. Since the entire lawsuit would thus be disposed of, we would not reach the question whether a prisoner's action under 42 U.S.C. § 1983 that contains both exhausted and unexhausted claims need be dismissed in its entirety under section 1997e(a). *See id.* We conclude, however, that the complaint does state a claim for a violation of Ortiz's due process rights.

"[T]o present a due process claim, a plaintiff must establish (1) that he possessed a liberty interest and (2) that the defendant(s) deprived him of that interest as a result of insufficient process." *Giano v. Selsky,* 238 F.3d 223, 225 (2d Cir.2001) (citation and internal quotation marks omitted). Prison discipline implicates a liberty interest when it "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner,* 515 U.S. 472, 484.

As a result of the Tier III hearing, Ortiz was sentenced to ninety days in SHU. According to his complaint, his treatment while in SHU was unusually harsh.

To be sure, with respect to "normal" SHU confinement, we have held that a 101- day confinement does not meet the *Sandin* standard of atypicality. *Sealey v. Giltner,* 197 F.3d 578, 589 (2d Cir.1999). The duration of SHU confinement, however, is not the only relevant factor. We have said that under abnormal or unusual SHU conditions, periods of

confinement of less than 101 days may implicate a liberty interest. *See Palmer v. Richards,* 364 F.3d 60, 65 (2d Cir.2004) ("SHU confinements of fewer than 101 days could constitute atypical and significant hardships if the conditions were more severe than the normal SHU conditions . . . ."); *Colon v. Howard,* 215 F.3d 227, 232 n. 5 (2d Cir.2000) ("We do not exclude the possibility that SHU confinement of less than 101 days could be shown on a record more fully developed than the one in *Sealey* to constitute an atypical and significant hardship under *Sandin.*"); *Sealey,* 197 F.3d at 586 ("Both the conditions and their duration must be considered, since especially harsh conditions endured for a brief interval . . . might . . . be atypical." (citation omitted)). In *Palmer,* we held that the defendant's confinement for seventy-seven days in SHU under unusually harsh conditions raised a question of fact sufficient to survive summary judgment on the issue of whether Palmer had been deprived of a liberty interest. *Palmer,* 364 F.3d at 66. The district court in the case before us thus erred when it dismissed Ortiz's due process claim based solely on the fact that his SHU confinement was for fewer than 101 days.

We need not delineate the precise contours of "normal" SHU confinement. For present purposes, it is sufficient to note that, ordinarily, SHU prisoners are kept in solitary confinement for twenty-three hours a day, provided one hour of exercise in the prison yard per day, and permitted two showers per week. *Palmer,* 364 F.3d at 65 n. 3 (citing N.Y. Comp.Codes R. & Regs. tit. 7, §§ 304.1-.14, 305.1-.6 (2003)). Ortiz alleges that for at least part of his confinement, he was kept in SHU for twenty-four hours a day, was not permitted an hour of daily exercise, and was prevented from showering

"for weeks at a time." First Amended Compl. ¶ 11. Based on these and Ortiz's other allegations relating to his treatment in SHU, we think that, if proved, they could establish conditions in SHU "far inferior," *Palmer,* 364 F.3d at 66, to those prevailing in the prison in general. We thus conclude that Ortiz has alleged that the ninety-day SHU sentence imposed on him was, under the circumstances, a hardship sufficiently "atypical and significant" to withstand a Rule 12(b)(6) motion as to the first part of the due process test.

In order for his due process claim to survive defendants' Rule 12(b)(6) motion, however, Ortiz must also have alleged that the prison imposed the SHU sentence without providing due process. *Giano,* 238 F.3d at 225. For a prison disciplinary proceeding to provide due process there must be, among other things, "some evidence" to support the sanction imposed. *Gaston v. Coughlin,* 249 F.3d 156, 163 (2d Cir.2001) (internal quotation marks omitted). In the case of a prison disciplinary sanction based solely on the evidence supplied by a confidential informant, we have said that this "some evidence" standard requires "some examination of indicia relevant to [the informant's] credibility." *Id.* (alteration in original) (citing *Giakoumelos v. Coughlin,* 88 F.3d 56, 61 (2d Cir.1996)). *See also Sira v. Morton,* __ F.3d __, __, No. 03-0156, 2004 WL 1719285, *16-*18, 2004 U.S. App. LEXIS 15897, *49-*56 (2d Cir. Aug.2, 2004) (discussing due process requirement of "some" assessment of confidential informant credibility in the context of prison disciplinary proceedings). The complaint sufficiently alleges that the "some evidence" standard was not met to survive defendants' Rule 12(b)(6) motion in this respect.

Ortiz's First Amended Complaint thus successfully states a Fourteenth Amendment due process claim. We must therefore decide whether the district court was nonetheless correct in dismissing Ortiz's action in its entirety because the Eighth Amendment claim had not been administratively exhausted.

IV. The Dismissal of Ortiz's Action

A. Section 1997e(a) and the Prison Litigation Reform Act

Ortiz's First Amended Complaint, as we have discussed, contained two claims: one alleging a violation of the Fourteenth Amendment with respect to which he had exhausted his prison administrative remedies, and the other alleging a violation of the Eighth Amendment with respect to which he had not.[1] 42 U.S.C. § 1997e(a) provides:

> Suits by prisoners.
>
> (a) Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

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1. As we have noted, Ortiz now concedes that his Eighth Amendment claim is not viable in any event. That does not alter the fact that Ortiz "brought," *see* 42 U.S.C. § 1997e(a), a lawsuit presenting both an exhausted claim and an unexhausted claim.

Id. Because Ortiz "brought" this action in which he asserted a claim with respect to which "such administrative remedies as are available" had not been exhausted, the action was improperly "brought" under the language of section 1997e(a). The question, then, is whether the district court was therefore required, under a so-called "total exhaustion" rule,[2] to dismiss the action in its entirety despite the presence of an otherwise viable, fully exhausted claim. We think not.

We note at the outset that if section 1997e(a) deprived district courts of jurisdiction over actions containing both exhausted and unexhausted claims, the district court, being without jurisdiction, would be required to dismiss Ortiz's action in its entirety. But we have expressly held to the contrary that section 1997e(a) does not divest district courts of jurisdiction over actions containing unexhausted claims. *Richardson v. Goord,* 347 F.3d 431, 433-34 (2d Cir.2003) (per curiam). Whether a prisoner's failure to exhaust administrative remedies is grounds for dismissal of an action or not, it is not jurisdictional grounds.

Having jurisdiction, we proceed to examine the language of the statute to determine if it tells us whether "mixed" actions must be dismissed in their entirety. *See, e.g., Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 438 (1998) ("[W]here the statutory language provides a clear answer, [our analysis]

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2. *See, e.g., Ross,* 365 F.3d at 1189 ("[T]he presence of unexhausted claims in [the prisoner's] complaint require[s] the district court to dismiss his action in its entirety without prejudice."); *Smeltzer v. Hook,* 235 F.Supp.2d 736, 742 (W.D.Mich.2002) ("Under the total exhaustion rule, the presence of an unexhausted claim warrants dismissal not just of that claim, but of the entire action.").

ends there . . . ."); *Cervantes-Ascencio v. INS*, 326 F.3d 83, 86 (2d Cir.) (per curiam) ("When construing statutes, we look to the statutory language which, if clear on its face, ends our analysis." (citing *Hughes Aircraft Co.*, 525 U.S. at 438)), *cert. denied*, 124 S.Ct. 483 (2003).[3] We do not think that the language of the statute answers that question.[4]

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3. One Circuit has concluded, without explanation, that the language of the statute requires such dismissal. *Graves v. Norris*, 218 F.3d 884, 885 (8th Cir.2000) (per curiam) ("When multiple prison condition claims have been joined, as in this case, the plain language of § 1997e(a) requires that all available prison grievance remedies must be exhausted as to all of the claims."). At least two district courts in our Circuit have, in unpublished opinions, come to similar conclusions. *See Vidal v. Gorr*, No. 02 Civ. 5554, 2003 WL 43354, at *1, 2003 U.S. Dist. LEXIS 26, at *2-*3 (S.D.N.Y. Jan.6, 2003); and *Saunders v. Goord*, No. 98 Civ. 8501, 2002 WL 1751341, at *3, 2002 U.S. Dist. LEXIS 13772, at *10-*11 (S.D.N.Y. July 29, 2002).

In *Ross v. County of Bernalillo, supra*, which we discuss in some detail below, the Tenth Circuit concluded that dismissal of a "mixed" action was required, but relied on the language of the statute only in passing. *See Ross*, 365 F.3d at 1190 ("To start, the language in § 1997e(a) itself suggests a requirement of total exhaustion because it prohibits an 'action' (as opposed to merely preventing a 'claim') from proceeding until administrative remedies are exhausted.").

4. Four district courts in this Circuit, by rejecting a "total exhaustion" rule, have at least implied that the language of section 1997e(a) does not require one. *See Scott v. Gardner*, 287 F.Supp.2d 477 (S.D.N.Y.2003); *Hattley v. Goord*, No. 02 Civ. 2339, 2003 WL 1700435, at *4-*7, 2003 U.S. Dist. LEXIS 4856, at *12-*22 (S.D.N.Y. Mar.27, 2003); *Dimick v. Baruffo*, No. 02 Civ. 2151, 2003 WL 660826, at *5-*6, 2003 U.S. Dist. LEXIS 2865, at *14 (S.D.N.Y.

(Cont'd)

Section 1997e(a) clearly instructs that an action such as Ortiz's containing exhausted and unexhausted claims should not have been "brought." But we do not think that it follows that the only possible response to the impermissibility of the bringing of the action is to dismiss it in its entirety—to kill it rather than to cure it. The statute does not say so. And

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(Cont'd)

Feb.28, 2003); *Nelson v. Rodas,* No. 01 Civ. 7887, 2002 WL 31075804, at *5, No. 02 Civ. 2151, 2002 U.S. Dist. LEXIS 17359, at *17-*22 (S.D.N.Y. Sept.17, 2002).

The Sixth Circuit, in several unpublished opinions, has tentatively adopted a rule that it need not dismiss "mixed" actions in their entirety, implying that section 1997e(a) does not require otherwise. *See, e.g., Riley v. Richards,* 210 F.3d 372 (table), 2000 WL 332013, at *2, 2000 U.S.App. LEXIS 5230, at *5 (6th Cir.2000) (citing *Hartsfield v. Vidor,* 199 F.3d 305, 309 (6th Cir.1999)). *But see Smeltzer,* 235 F.Supp.2d at 742-43 (criticizing *Riley* and the other, similar unpublished opinions that relied upon *Hartsfield*).

We ourselves have at least twice in the PLRA context permitted exhausted claims in "mixed" suits to survive dismissal of unexhausted claims. *See Davis v. New York,* 316 F.3d 93, 101-02 (2d Cir.2002); *Giano v. Goord,* 250 F.3d 146, 150-51 (2d Cir.2001). We did not expressly address the statutory-language issue in those decisions, however, and therefore draw no inferences with respect to the issue from them. *Cf. Rose v. Lundy,* 455 U.S. 509, 514 n. 5 (1982) (declining, when addressing "total exhaustion" principles in the context of 28 U.S.C. § 2254 habeas corpus applications, to give weight to the fact that in a previous case, the Court had, without addressing the issue, "reviewed the merits of an exhausted claim after expressly acknowledging that the prisoner had not exhausted his state remedies for all of the claims presented in his habeas petition").

section 1997e(c),[5] which addresses "dismissals" of some such suits by prisoners—and is therefore the place where we would expect to find guidance as to whether dismissal of "mixed" actions is required—is silent on the issue.[6]

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5. 42 U.S.C. § 1997e (c) provides:

> Dismissal.
>
> (1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.
>
> (2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

Id.

6. Moreover, while section 1997e(c)(1) instructs that courts "shall . . . dismiss any action brought with respect to prison conditions . . . if the court is satisfied that the action [meets any one of several conditions]," section 1997e(a), by contrast, provides no such explicit instruction about how courts should respond to actions containing unexhausted claims that have been impermissibly "brought" in violation of that section.

We thus find ourselves in a position similar to the Supreme Court's in *Rose v. Lundy,* 455 U.S. 509 (1982) (assessing the requirement of "total exhaustion" in the context of habeas corpus petitions). After reviewing the statute's text, we conclude that section 1997e is "too ambiguous" to sustain the conclusion that Congress intended to require district courts to dismiss any prisoner's action containing one or more unexhausted claims rather than to dismiss only the offending claims. *Id.* at 516. We therefore "turn to the . . . statute, its legislative history, and the policies underlying the exhaustion doctrine." *Id.* at 515.

B. Legislative History; Practical and "Policy" Considerations

We follow *Rose* 's guidance by looking first to section 1997e's legislative history. But the parties have not identified, and we are not otherwise aware of, any legislative history suggesting that Congress directly considered the question or had any particular intent with respect to whether "mixed" actions should be dismissed in their entirety. *See Alexander v. Davis,* 282 F.Supp.2d 609, 610 (W.D.Mich.2003) ("[T]he legislative history of the statutory section demonstrates no concern with this issue.").

Looking at the statute's legislative history in a more general sense, the purpose of the PLRA, originally enacted as Pub.L. No. 104-134, 110 Stat. 1321 (1996), which sets forth a broad set of rules governing litigation by prisoners in federal courts, was plainly to curtail what Congress perceived to be inmate abuses of the judicial process. *See generally* 3 Michael B. Mushlin, *Rights of Prisoners* § 16:1

(3d ed.2003); Margo Schlanger, *Inmate Litigation,* 116 Harv. L.Rev. 1555, 1565-69 (2003). To effect this goal, Congress erected an array of procedural barriers designed to make it more difficult for inmates to bring suit in federal court, including what is now codified as section 1997e(a), requiring that only administratively exhausted actions be brought. *See id.* at 1627-28. It is "[b]eyond doubt that Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits." *Porter v. Nussle,* 534 U.S. 516, 524 (2002); *see also* 141 Cong. Rec. 26,553 (1995) (statement of Sen. Hatch) ("[The PLRA] will help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits.").

We do not think that a requirement that district courts dismiss "mixed" actions in their entirety would help achieve Congress's goal of improving the quality of, or judicial efficiency in disposing of, prisoners' section 1983 suits.

First, there is the danger that such a regime would create an incentive for prisoners to file section 1983 claims, if they have more than one, in more than one lawsuit.[7] This obviously would not assist in lessening the burden on district courts.

7. In some cases a particular prisoner's incentive to split claims created by a total exhaustion rule would likely be mitigated by other factors, such as a desire to avoid paying multiple filing fees or risking incurring three "strikes." A "strike" is incurred when a prisoner brings an action or appeal that the court dismisses on the ground that it is "frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g). A prisoner who accrues three strikes is barred from proceeding *in forma pauperis* in future suits with respect to prison conditions. *Id.* There is an exception to this bar

(Cont'd)

Second, as several district courts have pointed out when addressing this issue, it is doubtful that action-dismissal rather than claim-dismissal will do more than require plaintiffs who bring "mixed" actions to refile their claims with the claims that were held by the district court to be unexhausted simply omitted.

> Given the short period of time allotted to prisoners to file grievances, *see e.g., Woodrich v. Greiner,* No. 01 Civ. 7892, 2003 WL 22339264, at *2 [, 2003 U.S. Dist. LEXIS 18256] (S.D.N.Y. Oct.10, 2003) (an inmate in a New York state prison must file his or her grievance within fourteen days of the alleged grievance), "a prisoner may not be able to raise or resolve unexhausted claims within state and local institutions." *Jenkins* [*v. Toombs,*] 32 F.Supp.2d [955,] 959 [(W.D.Mich.1999)]; *see also Cole* [*v. Miraflor*], 2003 WL 21710760, at *2 [, 2003 U.S. Dist. LEXIS 12641 (S.D.N.Y. July 28, 2003)] (holding that by failing to file grievance within the appropriate time period, prisoner had failed to exhaust administrative remedies). As a result,
>
> > prisoners are likely to simply amend their complaints to eliminate the unexhausted claims and refile. In that

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(Cont'd)
when "the prisoner is under imminent danger of serious physical injury." *Id.* And, of course, prisoners with three strikes are free to continue filing suits with respect to prison conditions so long as they pay filing fees and court costs.

> case, courts would be faced with exactly the same claims they could have resolved at the outset.

Id.

Scott v. Gardner, 287 F.Supp.2d 477, 488 (S.D.N.Y.2003); *accord Blackmon v. Crawford,* 305 F.Supp.2d 1174, 1179 (D.Nev.2004); *Hattley v. Goord,* No. 02 Civ. 2339, 2003 WL 1700435, at *7, 2003 U.S. Dist. LEXIS 4856, at *22 (S.D.N.Y. Mar.27, 2003).

Third, prisoners' actions may present questions as to whether one or more claims have been exhausted that are not only genuine, but challenging for the courts to decide. *See, e.g., Abney v. McGinnis,* No. 02-0241, __ F.3d __ (2d Cir.2004) (considering whether an inmate who obtains a favorable ruling that prison administrators subsequently do not implement has exhausted available remedies); *Hemphill v. New York,* No. 02-0164, __ F.3d __ (whether alleged threats to plaintiff by prison guard rendered administrative remedies not "available"); and *Johnson v. Testman,* No. 02-0145, __ F.3d __ (2d Cir.2004) (whether successfully prosecuting a grievance contesting a disciplinary sanction was sufficient to exhaust remedies with respect to an Eighth Amendment claim against a prison guard arising from events related to the conduct for which discipline was imposed). In any such action, the district court must first familiarize itself with the case and hear the positions of the parties in order to decide the exhaustion issue as a preliminary matter. It hardly seems to aid efficiency to require that, if the court decides the claim-exhaustion issue against the prisoner, it must then dismiss

any remaining exhausted claims only to allow the same case, absent the unexhausted claims, to be reinstituted, heard again on the exhausted issues, and then decided. This is all the more true when the exhausted and unexhausted claims are factually interrelated and the district court is therefore required to familiarize itself with the same factual background of the case twice.[8]

We are not the first Circuit to address the "complete exhaustion" issue based on considerations of policy and practicality. In *Ross v. County of Bernalillo, supra,* the Tenth Circuit concluded, contrary to our view, that section 1997e(a) requires dismissal of every action that contains unexhausted claims. The court relied largely on an analogy to the requirement of complete exhaustion in 28 U.S.C. § 2254 habeas corpus cases first established by the Supreme Court in *Rose v. Lundy, supra.*[9] According to *Ross,*

> Emphasizing comity principles, the [*Rose*] Court reasoned that the total exhaustion doctrine would 1) encourage prisoners to seek full relief first from the state courts, thus giving states the first opportunity to review claims of error, 2) create a more complete factual record that will aid federal courts in their review, and 3) relieve district courts of the difficult task of deciding whether multiple claims are severable.

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8. For this to happen, of course, the remaining exhausted claims must not be subject to dismissal on other grounds, such as the provisions of section 1997e (c)(2).

9. Section 2254 exhaustion rules have since been codified in section 2254 itself. *See* 28 U.S.C. § 2254(b) & (c).

Ross, 365 F.3d at 1189 (citing *Rose,* 455 U.S. at 518-19). Also, "[u]nder a total exhaustion rule 'both the courts and the prisoners should benefit, for as a result the district court will be more likely to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review.'" *Id.* at 1190 (quoting *Rose,* 455 U.S. at 520). The *Ross* court also concluded that policies underlying the PLRA supported the requirement that "mixed" petitions be dismissed in their entirety because doing so "would encourage prisoners to make full use of inmate grievance procedures and thus give prison officials the first opportunity to resolve prisoner complaints." *Id.* (citing *Porter,* 534 U.S. at 524-25).

The Tenth Circuit's carefully reasoned argument does not, however, convince us, primarily because we think its heavy reliance on *Rose* and habeas "total exhaustion" principles is misplaced.

The principles underlying habeas corpus exhaustion and section 1983 exhaustion differ significantly, making analogies between them problematic. The habeas exhaustion requirements, for example, arise out of fundamental principles of sovereignty.

> The [habeas] exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. Under our federal system, the federal and state courts are equally bound to guard and protect rights secured by the Constitution. Because it would be unseemly in our

> dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation, federal courts apply the doctrine of comity, which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.

Rose, 455 U.S. at 518 (citations, internal quotation marks, alterations, and footnote omitted). There is no comity issue of equivalent gravity "involved in prisoner civil rights actions, since prisoners are not required to press their claims in state courts and prison administrators generally limit their review to determining whether prison policy has been violated." *Scott,* 287 F.Supp.2d at 488 (quoting *Jenkins v. Toombs,* 32 F.Supp.2d 955, 959 (W.D.Mich.1999)).

And unlike the state court proceedings to which we defer in habeas proceedings, in prison administrative proceedings prison officials are generally not required to adhere to rules of evidence or other standards employed by courts of law in an attempt to assure accurate fact-finding. *See Wolff v. McDonnell,* 418 U.S. 539, 556 (1974) ("Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply."); *id.* at 566-70 (discussing differences between what due process requires in criminal trials and prison disciplinary proceedings); *Sira,* 2004 WL 1719285, at *9, 2004 U.S.App. LEXIS 15897, at *26-*28 (same);

2 Mushlin, *Rights of Prisoners*, § 9:1 (explaining that, in the context of prison disciplinary proceedings, "[m]any of the traditional safeguards associated with criminal trials . . . such as the right to a lawyer and the opportunity to cross-examine witnesses, may not be available."). Prison proceedings, conducted according to much less exacting procedural standards than those applicable to courts, are thus much less likely than are state court proceedings to "create a more complete factual record that will aid federal courts in their review." *Ross*, 365 F.3d at 1189.[10]

In any event, a rule permitting the dismissal of unexhausted claims does indeed defer to state administrative proceedings by insisting that prison administrators adjudicate each prisoner's section 1983 claim in the first instance. The fact that it does so on a claim-by-claim basis does not seem to us to have significant implications for state/federal comity. For similar reasons, we do not find persuasive the *Ross* court's observation that dismissing "mixed" actions in their entirety will "encourage prisoners to make full use of inmate grievance procedures." *Ross*, 365 F.3d at 1189. Under a contrary rule permitting the exhausted claims to be pursued in federal courts, prisoners are also encouraged to make full

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10. Ortiz urges us to look to the claim exhaustion approach that courts have applied in the context of federal anti-discrimination laws such as Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. **(Blue 27-30)** The goals of the anti-discrimination laws to provide and implement a broad, remedial scheme preventing such discrimination, *see, e.g., Edelman v. Lynchburg Coll.*, 535 U.S. 106, 115; *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972), and the goals of the PLRA are so radically different, however, that we gain no insight from the analogy.

use of such procedures: Unless they exhaust a claim in the prison system, it will not be heard in the courts.

Two other differences between section 2254 habeas applications and section 1983 prisoner actions also inform our judgment.

First, section 2254 applications are usually about a singular event—the petitioner's conviction in state court. The applicant's claims, exhausted or not, are likely to be different legal challenges to an interconnected series of facts raised as alternative methods to attack that conviction.

Prisoners' section 1983 actions, by contrast, routinely seek to address more than one grievance—sometimes a laundry list of grievances— relating to different events or circumstances.[11] "[T]he claims raised in a single complaint are [thus] less likely to deal with interrelated or intermingled factual issues than the claims raised in habeas petitions." *Scott,* 287 F.Supp.2d at 488 (quoting *Jenkins,* 32 F.Supp.2d at 959).

Second, a claim in a habeas application dismissed by a federal court because it is unexhausted may well yet be capable of exhaustion in the state courts and subsequent reassertion in a federal habeas proceeding. *Rose,* 455 U.S. at 520 ("Those prisoners who. . . submit mixed petitions nevertheless are entitled to resubmit a petition with only exhausted claims or to exhaust the remainder of their

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11. *Johnson v. Testman,* No. 02-0145, __ F.3d __ (2d Cir.2004), is a good example. There, the plaintiff, acting *pro se,* chose to combine in a single action different claims against different parties relating to different events.

claims."); *see also, e.g., Rodriguez v. Bennett,* 303 F.3d 435, 438-39 (2d Cir.2002) (discussing status of a habeas petition initially dismissed for failure to exhaust and subsequently refiled following exhaustion of remedies in state court). In such a case, the originally unexhausted claim would thus be capable of eventual federal court review after state court exhaustion is completed.

Because of the short time-limits ordinarily applicable to prison grievance procedures, by contrast, it is unlikely that, in prisoners' section 1983 actions, the unexhausted claims will be exhausted after they are dismissed, and then brought before the federal courts for an eventual decision. *See Blackmon,* 305 F.Supp.2d at 1179; *Scott,* 287 F.Supp.2d at 488; *Hattley,* 2003 WL 1700435, at *6, 2003 U.S. Dist. LEXIS 4856, at *22; *Jenkins,* 32 F.Supp.2d at 959. Once they are dismissed they are usually forever gone.[12]

There is thus a prospect that a district court that proceeds with exhausted habeas claims but dismisses unexhausted claims will be required to examine twice, separately, the same interconnected series of facts underlying the conviction—once when the initially exhausted claims are heard and once when the subsequently exhausted claims are heard. Under those circumstances, as the Supreme Court observed, "both the courts and the prisoners should benefit" from a requirement that all claims be dismissed so that all claims can later be heard at the same time, "for as a result the district court will be more likely to review all of the prisoner's claims

12. We express no view as to whether the result of our analysis would be the same if the prison grievance time-limits were materially longer than they are in New York State.

in a single proceeding, thus providing for a more focused and thorough review." *Rose,* 455 U.S. at 520.[13]

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13. It is possible that if exhausted claims in mixed section 2254 habeas applications were permitted to go forward to a decision in the federal courts while the other claims were dismissed to permit exhaustion in the state courts, any subsequent attempt by the applicant to reassert the dismissed unexhausted claims in a federal habeas application would be blocked by the rules governing second or successive habeas applications now contained in 28 U.S.C. § 2244 (previously reflected in the doctrine of "abuse of the writ," *see Rose,* 455 U.S. at 514 & n. 6). *See generally Adams v. United States,* 155 F.3d 582, 583 (2d Cir.1998) (per curiam) (discussing "stringent limits" on a prisoner's ability to bring second or successive habeas petitions under 28 U.S.C. § 2244). If this were so, the total exhaustion rule would *not* maximize the efficiency of habeas proceedings; a regime in which the federal court hears and decides the exhausted claims and dismisses the unexhausted claims which are then in most cases forever barred by "second or successive" limitations would be perfectly efficient.

In that case, though, there would arise another reason for a total exhaustion rule in habeas cases that does not fully obtain in section 1983 cases. A total exhaustion rule in habeas cases would, in fairness to prisoners, avoid this "second or successive" barrier against ultimate pursuit of the unexhausted claims by requiring dismissal of actions containing unexhausted claims in their entirety, thereby permitting them to be brought again, after state court exhaustion, in their entirety in the federal court. *See Slack v. McDaniel,* 529 U.S. 473, 487 (2000) ("A petition filed after a mixed petition has been dismissed under *Rose v. Lundy* before the district court adjudicated any claims is to be treated as 'any other first petition' and is not a second or successive petition."). There is a "three strikes" rule applicable to prisoners' section 1983 suits roughly analogous to the habeas "second or successive" bar, *see supra* footnote 7. But the rule burdens rather than effectively bars subsequent section 1983 claims and is therefore less of a reason for applying a total exhaustion rule in the section 1983 context.

But unexhausted prisoners' 1983 claims, once dismissed, are unlikely ever to be revived in the district court. And even if they are, they may well be about facts unrelated to those underlying the claims of which the court has already disposed. Addressing them in a separate proceeding may therefore involve relatively little duplication of effort. "[R]esolving all of a prisoner's civil rights claims together may [therefore] be less important" in section 1983 cases than in habeas cases. *Scott,* 287 F.Supp.2d at 488 (quoting *Jenkins,* 32 F.Supp.2d at 959). Indeed, it may not be important at all.

At the end of the day, then, we do not think that requiring district courts to dismiss the entirety of any prison-conditions action that contains exhausted and unexhausted claims, and thereby requiring prisoners to institute their actions containing only the exhausted claims in federal court all over again, is a meaningful way to "reduce the quantity and improve the quality of prisoner suits," *Porter,* 534 U.S. at 524, or to "help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits," 141 Cong. Rec. 26,553 (1995) (statement of Sen. Hatch). We therefore conclude that the presence of the unexhausted Eighth Amendment claim in Ortiz's complaint when he brought it did not require the district court to dismiss the action in its entirety.

We note, finally, that we expect that, in the ordinary case, once the district court dismisses the unexhausted claims, it will proceed directly to decide the exhausted claims without waiting for the plaintiff to attempt to exhaust available administrative remedies with respect to the dismissed claims. We see no reason to doubt that this is such an "ordinary" case.

Appendix A

CONCLUSION

For the foregoing reasons, we vacate the judgment and remand the case to the district court for further proceedings.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED MARCH 21, 2003

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2002

(Submitted: March 5, 2003 Decided: March 21, 2003)

Docket No. 02-0088

JOSE ORTIZ,

Plaintiff-Appellant,

v.

D. MCBRIDE, Sgt. & R.O. MARA,
Counselor of Arthur Kill Correctional Facility,

Defendants-Appellees.

Before: CALABRESI and SACK, *Circuit Judges*, and PAULEY,* *District Judge*.

PER CURIAM.

Jose Ortiz appeals the dismissal of claims that he brings pursuant to 42 U.S.C. § 1983 for alleged violations of his

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* The Honorable William H. Pauley III, United States District Judge for the Southern District of New York, sitting by designation.

rights under the Eighth and Fourteenth Amendments to the United States Constitution. This appeal raises a number of issues as to the exhaustion requirements of the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, Title VIII, 110 Stat. 1321-66 (1996), as well as significant questions on the merits of Ortiz's claims. We order that counsel be appointed, that additional briefing and oral argument be scheduled, and that this panel retain jurisdiction over the appeal.

BACKGROUND

In July 1999, Jose Ortiz, an inmate in the custody of the State of New York, filed *pro se* a complaint in the United States District Court for the Eastern District of New York. Ortiz sought, pursuant to 42 U.S.C. § 1983, monetary damages against defendants D. McBride, a corrections officer at the Arthur Kill Correctional Facility ("Arthur Kill"), and R.O. Mara, a counselor at Arthur Kill, for alleged violations of his Eighth Amendment right against cruel and unusual punishment and of his Fourteenth Amendment right to due process. Counsel was appointed and Ortiz subsequently filed an amended complaint.

We set forth the facts as alleged in Ortiz's complaint. In September 1998, McBride, purportedly on the word of a confidential informant, accused Ortiz of selling drugs in Arthur Kill. McBride then ordered Ortiz to take a total of four urine tests, none of which showed any traces of drugs. Despite these results, McBride instituted misbehavior charges against Ortiz for drug possession and drug smuggling. In an October 1998 hearing, over which Mara presided, Ortiz was

found guilty of the drug violations. The only evidence presented at the hearing was McBride's testimony about his alleged conversation with the informant, whose identity remained confidential. No physical evidence or other witnesses were presented. Ortiz was sentenced to 90 days segregation in the Special Housing Unit (SHU), as well as loss of packages, commissary, phone and recreation privileges for that time.

After spending 57 days in SHU at Arthur Kill, Ortiz was transferred to another correctional facility, where he served the duration of the 90-day SHU term. The complaint further alleged that while confined in SHU at Arthur Kill, Ortiz was subjected to conditions and humiliations beyond those experienced by other SHU inmates. Specifically, Ortiz alleged that for three weeks he was confined twenty-four hours a day, without the daily hour of recreation generally accorded SHU inmates, that he was denied a shower for weeks at a time, that he was denied his deodorant, toothpaste and personal items, that his clothes were maliciously drenched in baby oil by corrections officers, and that he was not fed until hours after other inmates had eaten and was given no eating utensils, thereby forcing him to eat with his hands, which he was prevented from washing. Finally, Ortiz claimed that after he had served the ninety days in SHU, the Commissioner of Correctional Services, without explanation, reversed Ortiz's conviction of the prison drug charge.

The defendants moved to dismiss, pursuant to Rule 12(b), both Ortiz's original and his amended complaints. *See* Fed. R. Civ. P. 12(b). While conceding that Ortiz had not been permitted to review statements or reports provided

by the confidential informant prior to the hearing, the defendants argued that Ortiz's complaint did not allege a violation of a constitutionally protected liberty interest, since a 90-day term in SHU did not constitute an "atypical and significant hardship . . . in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). The defendants also maintained that Ortiz's Eighth Amendment claim must fail because (1) Ortiz alleged no personal involvement on the part of the defendants, but based his claims against the defendants solely on the fact that both were supervisory officials, and (2) Ortiz had not administratively exhausted that claim, as required by the PLRA, 42 U.S.C. § 1997e(a). The defendants further argued that because the complaint contained an unexhausted claim (the allegation of Eighth Amendment violations), it should be dismissed in its entirety, despite the presence of an exhausted claim (the allegation of Fourteenth Amendment violations).

In his memorandum of law in opposition to the motion to dismiss, Ortiz argued that because the conditions of his confinement in SHU were much worse than ordinary SHU conditions, his confinement in SHU was an "atypical and significant hardship" that triggered the protections of the Fourteenth Amendment. He also suggested that it was premature for the court to determine whether or not the defendants were aware of the conditions of SHU and therefore were subject to supervisory liability for the Eighth Amendment violations. Finally, Ortiz argued that the defendants had not proven that Ortiz had failed to exhaust his administrative remedies for his Eighth Amendment claim. Additional light was cast on the question of whether Ortiz

had exhausted his Eighth Amendment claim when, in a hearing on the defendants' motion to dismiss, Ortiz represented that he had made oral complaints and had submitted several written grievances to prison guards, but had never received an official response. Moreover, Ortiz's attorney stated that the guards had threatened to assault Ortiz if he continued to complain about his conditions.

At the close of the hearing, the district court (Weinstein, *J.*) granted the defendants' motion to dismiss. It ruled from the bench as follows:

> This constitutes my opinion in the case: The Court is compelled to dismiss the case. The main problem that the court saw in the papers was the problem of lack of a test of the veracity of the informer who apparently provided the basis for the complaint by the sergeant. However, there is no point in pursuing that matter since the administrative proceedings within the prison resulted in dismissal of the complaint. So that the plaintiff has obtained all that could be obtained on that issue.
>
> With respect to the conditions within the cramped cell, the Court is compelled under the decisions of the Court of Appeals for the Second Circuit to dismiss those complaints. The Court of Appeals for the Second Circuit requires a very high standard of abuse. It has to be atypical and significant hardship under *Colon* [*v. Howard*], 215 F.3d [227] (2d Cir. 2000), and other opinions of the Second Circuit.

Appendix B

> Moreover, it is very clear that the Second Circuit in general requires special incarceration of more than 101 days. That is *Colon*, 215 F.3d at 232. . . .
>
> The showering and other personal issues, in connection with other circumstances, may constitute an abusive situation. However, in view of the release from these circumstances within the prison within the 90 days, and dismissal on the main issue, under the cases the Court believes it has no alternative but to dismiss.
>
> The Court of appeals in *Neal* [*v.*] *Goord*, 267 F.3d 116 [2d Cir. 2001], required dismissal for failure to exhaust administrative remedies. In this case the exhaustion with respect to the main issue resulted in a favorable decision for the plaintiff. The oral testimony as well as other information before this Court does not make clear any exhaustion with respect to these other issues.

Judgment was entered against Ortiz on March 19, 2002.

DISCUSSION

This court construes appellate briefs submitted by *pro se* litigants liberally and reads such submissions to raise the strongest arguments they suggest. *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994). The rule favoring liberal construction of *pro se* submissions is especially applicable to civil rights claims. *Cf. Weinstein v. Albright*, 261 F.3d 127, 132 (2d Cir. 2001).

Appendix B

Ortiz appeals *pro se* from the district court's dismissal of his appeal, arguing mainly that the district court erred in dismissing his claims based on a failure to exhaust. This court has noted that under the administrative scheme applicable to New York prisoners, resolution of an inmate's grievances through informal channels can satisfy the exhaustion requirement of 42 U.S.C. § 1997e(a). *See Marvin v. Goord*, 255 F.3d 40, 43 n.3 (2d Cir. 2001) (per curiam) (citing 7 N.Y.C.R.R. § 701.1). More recently, we have ordered that counsel be appointed in four pending cases that address whether inmates who did not fully comply with the dictates of New York law nonetheless exhausted their claims in other ways. *Abney v. New York Dep't of Corr. Servs.*, No. 02-0241 (2d Cir. Feb. 13, 2003) (order granting motion to appoint counsel); *Johnson v. Reno*, No. 02-0145 (2d Cir. Feb. 13, 2003) (same); *Hemphill v. New York*, No. 02-0164 (2d Cir. Oct. 18, 2002) (same); *Giano v. Goord*, No. 02-0105 (2d Cir. Aug. 22, 2002) (same). While Ortiz's attempts to exhaust his Eighth Amendment claim may be more limited than those at issue in these cases, Ortiz has contended that he filed written grievances without receiving a response and that he was deterred from further pursuing administrative remedies by the guards' threat of assault. And that is enough to raise the issue currently being considered by us in the four just mentioned cases.

In addition to the question of whether Ortiz administratively exhausted his Eighth Amendment claim for purposes of the PLRA, this case raises the question of whether the PLRA requires that a prisoner exhaust every claim raised in order to be able to proceed on any one claim. In other words, if Ortiz has not administratively exhausted his Eighth

Amendment claim, does the PLRA bar consideration of his Fourteenth Amendment due process claim, a claim which all agree was administratively exhausted? District courts in this circuit are currently split on the question of whether the PLRA requires such "total exhaustion." *Compare, e.g., Law v. Bergamini*, No. 01-CV-463, 2003 WL 133272 (N.D.N.Y. Jan.14, 2003) (dismissing without prejudice complaint that asserted exhausted and unexhausted claims), *Vidal v. Gorr*, No. 02 Civ. 5554, 2003 WL 43354 (S.D.N.Y. Jan. 6, 2003) (same), and *Saunders v. Goord*, No. 98 Civ. 8501, 2002 WL 1751341 (S.D.N.Y. July 29, 2002) (same), with *Espinal v. Coughlin*, 98 Civ. 2579, 2002 WL 10450 (S.D.N.Y. Jan. 3, 2002) (dismissing unexhausted claims while ruling on the merits of exhausted claims). Our order appointing counsel in *Johnson v. Reno*, No. 02-0145 (2d Cir. Feb. 13, 2003), directed counsel to consider whether the PLRA included a "total exhaustion" requirement.

While we cannot consider Ortiz's Fourteenth Amendment claim until our jurisdiction to hear it is established, we note — without expressing any ultimate opinion on its merits — that this claim is by no means frivolous. Ortiz alleges that he was subjected to unusually harsh conditions during his SHU confinement at Arthur Kill. Given this assertion, the fact that Ortiz's confinement was for a period of less than 101 days need not, under our cases, entail that the district court had "no alternative but to dismiss." In *Sealey v. Giltner*, 197 F.3d 578 (2d Cir. 1999), we held that the plaintiff had not met his burden of showing that his 101-day confinement in SHU met the Sandin standard of atypicality. *Id.* at 589. But both Sealey and the case cited by the district court, *Colon v. Howard*, 215 F.3d 227 (2d Cir.

2000), make clear that duration is not the only relevant factor. The conditions of confinement are a distinct and equally important consideration in determining whether a confinement in SHU rises to the level of "atypical and severe hardship" as required by *Sandin*. *Sealey*, 197 F.3d at 586 ("Both the conditions and their duration must be considered, since especially harsh conditions endured for a brief interval and somewhat harsh conditions endured for a prolonged interval might both be atypical." (citation omitted)); *Colon*, 215 F.3d at 230 (emphasizing that, in that case, "[t]he conditions were the normal conditions of SHU confinement in New York").[1]

Given the complexity of these and other issues in this case, we believe it appropriate to appoint counsel to represent Ortiz in this appeal, if he so chooses. We therefore ORDER that, if he so wishes, Ortiz be appointed counsel to represent him in this appeal. In addition to any other arguments counsel may choose to raise, the following issues should be addressed: (1) whether Ortiz's proffered evidence that he administratively exhausted his Eighth Amendment claim satisfies the requirements of § 1997e(a); (2) whether § 1997e(a) requires "total exhaustion" and, if so, whether

1. It is also not obvious that *Sealey* established a *per se* rule that an SHU confinement under normal conditions and of a duration of 101 days or less necessarily involves no protected liberty interest. *Sealey* noted that the record in that case was "less than adequate," 197 F.3d at 586, and arguably left open the possibility that a more complete record as to the "conditions of administrative confinement at other New York prisons, as well as the frequency and duration of confinements imposing significant hardships" might show that a 101-day confinement in SHU does implicate a constitutionally protected liberty interest, *id.* at 589.

Ortiz may now withdraw any unexhausted claims; (3) whether Ortiz's factual allegations that the conditions of his confinement in SHU were unusually harsh sufficed to raise the question of whether that confinement implicated a constitutionally protected liberty interest so as to preclude 12(b) dismissal; (4) whether Ortiz's complaint adequately pled, or could be amended adequately to plead, that the defendants are subject to supervisory liability, under the test described in *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994), for the alleged Eighth Amendment violations. Counsel may, of course, seek to join any of the above-cited pending cases that concern the exhaustion requirements of the PLRA. Should counsel elect to do so, this panel should be informed.

The Clerk of the Court is further ORDERED, after the appointment of counsel, to schedule additional briefing and, as appropriate, oral argument. This panel retains jurisdiction over this appeal.

APPENDIX C — MEMORANDUM, JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED MARCH 11, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV99-3766 (JBW)

JOSE ORTIZ

-v-

D. MCBRIDE et al

MEMORANDUM, JUDGMENT AND ORDER

For the reasons stated orally on the record it is hereby ordered that the defendants motion to dismiss is granted. The case is dismissed. No costs or disbursements are granted.

The pro-se Clerk is directed to file a notice of appeal on behalf of the petitioner.

SO ORDERED

s/ Jack B. Weinstein
JACK B. WEINSTEIN
SR. U.S.D.J.

DATE-:3/11/02

APPENDIX D — EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED MARCH 7, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 99-3766

JOSE ORTIZ,

Plaintiff,

-against-

D. McBRIDE, et al.,

Defendant.

United States Courthouse
Brooklyn, New York

March 7, 2002
11:00 o'clock a.m.

TRANSCRIPT OF MOTION
BEFORE THE HONORABLE JACK B. WEINSTEIN
UNITED STATES DISTRICT JUDGE

* * *

Appendix D

[7] * * *

THE COURT: Thank you, everybody.

This constitutes my opinion in the case: The Court is compelled to dismiss the case. The main problem that the Court saw in the papers was the problem of lack of a test of veracity of the informer who apparently provided the basis for the complaint by the sergeant.

However, there is no point in pursuing that matter since the administrative proceedings within the prison resulted in the dismissal of that complaint. So that the [8] plaintiff has obtained all that could be obtained on that issue.

With respect to the conditions within the cramped cell, the Court is compelled under the decisions of the Court of Appeals for the Second Circuit to dismiss those complaints. The Court of Appeals for the Second Circuit requires a very high standard of abuse. It has to be atypical and significant hardship under Colon, C O L O N, 215 F.3d, 222, 2000, and other opinions of the Second Circuit.

Moreover, it is very clear that the Second-Circuit in general requires special incarceration of more than 101 days.

That is Colon, 215 F.3d at 232.

Double celling under these cases as well as earlier cases of the Supreme Court do not constitute cruel and unusual punishment.

THE INTERPRETER: Did you say double celling?

THE COURT: Two people in one cell.

THE INTERPRETER: Thank you, Your Honor.

THE COURT: The showering and other personal issues, in connection with other circumstances, may constitute an abusive situation. However, in view of the release from these circumstances within the prison within the 90 days, and the dismissal on the main issue, under the cases the Court believes it has no alternative but to dismiss.

The Court of Appeals in Neal Goord, 267 F.3d 116, [9] required dismissal for failure to exhaust administrative remedies. In this case the exhaustion with respect to the main issue resulted in a favorable decision for the plaintiff. The oral testimony as well as the information now before the Court does not make clear any exhaustion with respect to these other issues.

The Court very much regrets any inconvenience and difficulty to this plaintiff. If the plaintiff wishes, the Court will direct the clerk to file a notice of appeal for the plaintiff so that he can possibly take an appeal to the Court of Appeals for the Second Circuit.

Do you wish, that, sir?

MR. ORTIZ: Yes.

THE COURT: The clerk will file a notice of appeal. Prepare a brief order, memorandum, and judgment dismissing for the reasons stated orally on the record.

The defendant will order a copy of the minutes, supply a copy to counsel, and counsel will supply a copy to the plaintiff.

MR. CARDINALE: Yes.

MR. RODRIGUEZ: Yes.

THE COURT: It is very nice talking to you, sir.

MR. ORTIZ: Excuse me, may I ask a question?

THE COURT: Yes.

MR. ORTIZ: Can you assign another lawyer not the [10] one I currently have on this case?

THE COURT: No. The case before me is completed. If you want further relief you have to go to the Court of Appeals of the Second Circuit.

MR. ORTIZ: Okay.

THE COURT: Thank you, very much. Have a nice day, sir.

MR. ORTIZ: Thank you.

(Proceedings concluded.)

APPENDIX E — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DECIDED NOVEMBER 2, 2004

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

No. 99-CV-03766 (JBW)

JOSE ORTIZ,

Plaintiff,

v.

D. McBRIDE, SGT. & R.O. MARA,
Counselor of Arthur Kill Correctional Facility,

Defendants.

November 2, 2004, Decided

MEMORANDUM AND ORDER

Jack B. Weinstein, Senior United States District Judge:

The Court of Appeals for the Second Circuit has remanded the case. Its opinion suggests a more intense interest by that court in the prompt and effective disposition of allegations by state prisoners that they have been improperly adjudicated by the prison system as violators of prison rules and punished in a cruel and unusual way.

Ortiz v. McBride, 380 F.3d 649, 663 (2d Cir. 2004). First, the Court of Appeals for the Second Circuit clarified the position that its 101-day rule does not apply where a lesser period of punishment is abnormally severe. *Id.* at 654 ("We have said that under abnormal or unusual SHU conditions, periods of confinement of less than 101 days may implicate a liberty interest."). Second, it held that the rule requiring exhaustion of all claims does not apply to section 1997(e)(a). *Id.* at 657 ("Section 1997e(a) clearly instructs that an action such as Ortiz's containing exhausted claims should not have been 'brought.' But we do not think that it follows that the only possible response to the impermissibility of the bringing of the action is to dismiss it in its entirety—to kill it rather than to cure it.").

The court emphasized a need for prompt disposition on the merits of the exhausted claims by remarking:

> We note, finally, that we expect that, in the ordinary case, once the district court dismisses the unexhausted claims, it will proceed directly to decide the exhausted claims without waiting for the plaintiff to attempt to exhaust available administrative remedies with respect to the dismissed claims. We see no reason to doubt that this is such an "ordinary" case.

Id. at 663. In the absence of this directive, a trial court might usually encourage all claims to be expeditiously exhausted so that discovery and trial could go forward on all related claims together, and so that a trial with the same witnesses and documents would not have to be repeated.

Appendix E

To carry out the express and implied concern of the Court of Appeals for the Second Circuit, counsel shall be promptly appointed by the magistrate judge. It is recommended that appointed counsel have adequate resources and lawyer-power to handle exhausted claims quickly and comprehensively. The appointed attorneys may, nevertheless, consider assisting in the exhaustion of the unexhausted claims, without allowing the process of exhaustion to delay disposition of the exhausted claims.

Counsel should consider whether it is desirable for the district judge to visit the prison where the alleged unconstitutional violation occurred so that he can better appreciate the punishment's effect. If the answer is in the affirmative, counsel should advise whether accompanying the inspecting party shall be a photographer and adequate devices for measuring the size of any cell used and recording any other relevant details.

Counsel shall consider whether it would be appropriate to hold a hearing at the prison facility with plaintiff and witnesses there. Should the case ultimately be tried by a jury, counsel should consider whether the trial should be held at the prison so that the jury, selected in the Eastern District, could observe the facilities in question. Procedures for trying the case without bringing the plaintiff to Brooklyn, thus interrupting his period of incarceration, should be considered. Other issues and procedures implicated by the nature of the remand should be addressed by the attorneys.

Appendix E

A preliminary hearing is scheduled for December 14, 2004 at 10 a.m. The Warden is to make the plaintiff available via telephone.

SO ORDERED.

Jack B. Weinstein

Dated: November 2, 2004

Brooklyn, New York

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED NOVEMBER 9, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV99-3766 (JBW)

JOSE ORTIZ

-v-

D. MCBRIDE et al

Given the mandate of the Court of Appeals for the Second Circuit, this Court lacks authority to stay the matter. So ordered November 9, 2004.

SO ORDERED

s/ Jack B. Weinstein
JACK B. WEINSTEIN
SR. U.S.D.J.